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Pakistani Supreme Court and Constitutional Space

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EXCLUSIVE: Pakistani SC and constitutional space —Shubhankar Dam



The SC must choose its periphery carefully, act incrementally and legitimise the constitutional space by a language that has wide, if not catholic, appeal in Pakistan. That probably is the best way forward

The media in Pakistan routinely eulogises the Supreme Court of India. For many, it is a national messiah, an independent institution that has played a key role in sustaining democratic politics in India. But it wasn't this way always.

Like the judiciary in Pakistan, the higher judiciary in India has had its own share of bad deeds and dark moments. However, the Court's history and its moment of transformation in the 1970s may hold valuable lessons for Pakistan's way forward.

The Nehruvian years (1950-1964) were relatively uneventful. Notwithstanding his socialist commitments, for the most part, Nehru's faith in some of the fundamental pillars of constitutional democracy was relatively unimpeachable.

He disagreed with the so-called conservative judges on issues of land reforms. But he wasn't disrespectful: Nehru's disagreements did not become a pretext for undermining the judiciary.

The next phase, however, was in direct contrast. Between 1965 and 1977, the relationship took a turn for the worse. The Court and the Executive did not just disagree, they confronted each other.

In 1973, the Court by a narrow majority delivered the "basic structure" verdict: while Parliament had authority to amend every provision of the Constitution, it could not do so in a way that violated the basic structure of the Constitution.

Judge AN Sen dissented: he strongly contested the presence of any basic structure in the Constitution. For him, everything, even democracy, could be abrogated. As a reward, Mrs Gandhi promoted Sen to the post of the CJ, superseding three senior judges.

The latter resigned in protest: it was a radical break from a constitutional convention that guaranteed the position of the CJ to the senior-most judge. It was, at the same time, a blatant effort to co-opt the judiciary: "decide in our favour and there are prizes to be won."

But the worst was yet to come. Mrs Gandhi declared Emergency in June 1975 and the Court was called upon to decide on the availability of a *habeas corpus* writ during the proclamation of Emergency.

To the surprise of many and against the expectations of many more, the Court (wary of Executive retribution) refused to issue a writ. To put it simply, the State could arbitrarily imprison citizens and the Court could not offer any protection. Judge HR Khanna wrote a spirited dissent and, once again, paid the price. Mrs Gandhi refused to appoint Khanna as the CJ and he resigned in protest.

Beaten into submission by an authoritarian Executive, the SC in 1976 was neither "independent" nor a messiah. But then something happened that changed the course and that something may be of immediate relevance to Pakistan.

Post-1978, the SC renewed efforts to construct a legitimate space for a form of judicial review that was both novel and intrusive. The novelty, however, was organic: it was achieved incrementally, not immediately.

Particularly between 1978 and 1983, the judges consciously selected their "intended beneficiaries;" acquiescing with the State at times while confronting it on other times. At the forefront of judicial concern was what may generically be called the "periphery" — prisoners, bonded labourers, under-trial interns, children and non-unionised labour.

Each of these categories, in some sense, had less than a "full voice" in accessing structures of democratic politics in India. Two socialist judges, Bhagwati and Krishna Iyer, passionately wrote about the "rule of law", the humanist philosophy of the Indian Constitution and the inhumane life of those on the periphery.

The judgments were about people who we don't see often and rarely hear about. And it was hard to disagree with the Court. Who, after all, could disagree with the Court that prisoners must be treated humanely? Who could disagree that bonded labour was an affront to the dignity of human life? Who could disagree that care must be taken to ensure that children are not abused when put up for adoption?

But in providing the periphery with some constitutional visibility, the Court was also asserting its space/authority to speak on their behalf. Secondly, it employed a carefully crafted rhetoric: judges spoke the language of suffering, exclusion and constitutional rights.

Not surprisingly, it faced little opposition in legitimising its new role. This point is worth highlighting: the Court transformed itself by initially talking about matters/people that none could object to. And it wasn't long before that the new role became the *expected* role.

It was from these humble but carefully constructed origins that the SC eventually spread its wings to become, what according to some is, the most powerful Court in the world. Public law litigation in India, post 1978, was not just about resolving disputes anymore.

Litigation was about strategising political behaviour: it became an alternative route for judicially achieving that which could not be democratically achieved.

Conversely, it paved the way for the SC to influence, direct and on occasions confront national politics.

Some of the recent events suggest that the SC of Pakistan has adopted a strategy not radically different from its Indian counterpart. Consider the Court's recent outburst against price-rise and its impact on the poor. Consider, similarly, its severity of language against senior police officials for their lawlessness in the streets of Islamabad and Lahore. There is an emerging pattern and that's a good portent.

The SC must choose its periphery carefully, act incrementally and legitimise the constitutional space by a language that has wide, if not catholic appeal, in Pakistan. That probably is the best way forward.

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